

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 167 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MAHENDRA H FADIA

Versus

MEHSANA MUNICIPALITY

Appearance:

MR SK JHAVERI for Petitioner

MR MI PATEL for Respondent No. 1

None present for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 01/10/97

C.A.V. JUDGEMENT

1. The petitioner, a Project Officer of Mehsana Municipality, Mehsana, filed this special civil application and prayed for the following reliefs:

(A) That a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ direction or order be issued directing the

respondents to appoint the petitioner as a Project Officer in Mehsana Municipality;

(B) That a writ of mandamus or any other appropriate writ order or direction be issued directing the respondent No.1 Mehsana Municipality to pay to the petitioner the difference of pay for working on the post of Project Officer;

(C) That pending the hearing and final disposal of this petition the respondents be restrained from appointing any person as Project Officer pursuant to Advertisement Ann. 'M'.

(D) To award the cost of this petition;

(E) To grant such other and further relief as the nature of the case may require.

2. The petitioner was given the appointment as Community Organiser on 1-12-1977 in the Urban Community Development Programme sponsored by the Central Government through the State Governments. The State Government implemented this programme through Municipalities. It was a plan initially for five years. Ultimately there is no dispute that this plan was taken up by the Municipalities. In connection with the implementation of that scheme, the staff has to be appointed for each separate unit. We are only concerned with the staff of Community Organisers and the Project Officer. Under the aforesaid scheme, a project has been opened in Mehsana Municipality on 7-11-1977. In all six Community Organisers and one Project Officer were appointed. The person who was holding the post of Project Officer in the Project has resigned therefrom on 13th June, 1980 and the petitioner was ordered to take the charge of Project Officer. From the averments made by the petitioner in the special civil application, it is clearly borne out that he was given a fixed term appointment on the post of Project Officer, which was extended from time to time. It also comes out from the record of this special civil application that the appointment of the petitioner on the post of Project Officer was purely on temporary and ad hoc basis and that has been extended from time to time by the Director of Municipalities. As per the scheme, the appointment on the post of Project Officer has to be made by direct recruitment. However, in due course it was provided that the Project Officer should be promoted from the Community Organisers. The respondent-Municipality invited the applications through an advertisement issued

in the daily "Jai Hind" on 3-8-1984 for the appointment of Project Officer (U.C.D.). The petitioner felt aggrieved of this action of the respondent-Municipality as what he claimed that he should have been given the promotion on this post and challenged that action before this Court by filing special civil application No.4228/84. That special civil application came to be withdrawn by petitioner unconditionally on 3-1-1985. The order which has been passed by this Court in that petition has been reproduced by the petitioner in para No.19 thereof. This petition has been filed by the petitioner before this Court on 15th January, 1985, possibly when the interviews were to be taken. After filing of this petition, the petitioner has amended this special civil application and prayer has been for further addition to the reliefs to the prayers (A) and (B), which are as under:

(A) "and to issue a letter of appointment of his having been appointed to the post of Project Officer on regular post with effect from 1st April, 1982 and on permanent basis with effect from 1st February, 1984, and be pleased to issue a writ of prohibition or writ in the nature of prohibition or any other appropriate writ or direction or order restraining the respondents from acting upon and considering the applications for the post of Project Officer and making appointment of any person other than the petitioner to the post of Project Officer (U.C.D.) in pursuance to the advertisement at Exh. 'M' to the petitioner."

(B) "with effect from 16th December, 1980 and on the basis of his regularly earning increments in the scale of pay admissible to the Project Officer being Rs.650/- to Rs.1200/- and pay and allowances actually disbursed to him from 16th December, 1980."

So by this amendment what the petitioner is claiming for issuance of a letter of appointment on the post of Project Officer from 1-4-1982 as well as the order of confirmation from 1st February, 1984 with all consequential benefits i.e. the salary etc.. By amendment, the petitioner stated that though he has been working on the post of Project Officer from 16th December, 1980, he has not been given the pay in the pay scale of the said post as well as the increments.

3. This Special Civil Application is contested by

the respondent No.1 by filing reply to the same. The case of the respondent No.1 is that the project was made permanent, and as such the appointment has to be made on the post of Project Officer as per the rules of the Municipality.

4. The learned counsel for the petitioner contended that the petitioner is working on the post of Project Officer since 16th June, 1980, and as such, he should have been made permanent on this post rather than to have the recourse to direct recruitment on this post. It has next been contended that the respondent No.2 vide its order dated 10th January, 1984 addressed to the respondent No.1 stated that the petitioner can be considered to have continuously appointed as Project Officer from 1-4-1982. So what the learned counsel for the petitioner contended that his appointment was with the approval of the respondent No.2, and as such, he should have been made permanent from 1st April, 1984.

5. On the other hand, the counsel for the respondent, Shri M.I. Patel submitted that this writ petition is not maintainable as the petitioner earlier filed a petition which has been withdrawn by him without any liberty to file fresh petition. It has next been contended that the petitioner was not given any regular appointment by direct recruitment or promotion to the post of Project Officer. It was only a stop-gap arrangement which has been made pending the recruitment to be made on the post of Project Officer when the incumbent thereof had resigned from the post. This appointment continued, but merely because continuing the petitioner on ad hoc basis on higher post will not give any right to him for regularisation thereof as well as to be made permanent. Being the post of Project Officer, the approval has been taken of the respondent No.2, but this approval was only taken of ad hoc appointment.

6. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

7. From the averments made in this special civil application as well as the orders filed, it is clear that it was only a stop-gap arrangement which has been made by giving the charge of the post of Project Officer to the petitioner. The order dated 16th December, 1980, annexure 'D' is the order of the promotion of the petitioner on the post of Project Officer. On scrutiny of this order, following facts are reflected:

(i) this promotion has been given to the petitioner

only on the basis of his application.

(ii) this promotion has not been given after adjudging suitability of the petitioner for promotion by Departmental Promotion Committee.

(iii) the promotion has been given purely on temporary basis and for a fixed term upto 31st March, 1981.

It has been mentioned in this order that the promotion is given on trial basis and regular promotion shall be given only thereafter. Trial basis does not mean that it was a promotion after selection and he has been placed on probation. It was purely an ad hoc and temporary promotion for a fixed term and this term of promotion has been extended from time to time. The petitioner has not produced on record any order from the Director Of Municipalities whereunder his promotion has been regularised. Otherwise also, I have my own reservation whether this course would have been open to the Director of Municipalities in this case. Promotion is one of the sources of recruitment and before giving the appointment to a person by promotion the candidature of all the eligible persons has to be considered and only after the selection by the Selection Committee or Departmental Promotion Committee, the person so selected for promotion should have been given the promotion. That is not the only thing, but the criteria should be laid down for making promotion to the next higher post. Admittedly, there were five other persons in the project on the post of Community Organiser and it is not the case of the petitioner that he has been given the promotion after considering the cases of all the aforesaid persons. The petitioner has also failed to produce any document on record of this special civil application to show that his promotion has been regularised and he has been made permanent on the post. Not only this, the counsel for the petitioner has further failed to point out any provision from the scheme itself or from the Municipalities Act whereunder the petitioner has acquired any right of regularisation on the post of Project Officer on the basis of his temporary and ad hoc appointment.

8. In para-15(D) of the special civil application, the petitioner made an averment that he came to be appointed to the post of Project Officer on regular basis w.e.f. 1st April, 1982, but the petitioner has failed to produced any order of his regular appointment on this post. The status of an ad hoc promotee is not in any manner better than the status of temporary appointee.

The Apex Court in the case of M.P.H.S.V.N. vs. Devendra Kumar reported in JT 1995 (1) SC 198 held that the temporary Government servant does not become permanent unless he acquires that capacity by force of any rule or is declared as permanent servant. In the present case, as stated earlier, the counsel for the petitioner has failed to produce on record any statutory rule or any resolution of the Municipality making the petitioner permanent or making his appointment to be regular. Similarly, there is no declaration on record that he has been made regular or permanent on the post. In the case of State of Orissa vs. Dr. Prari Mohan Misra reported in JT 1995 (2) SC 54 which was the case of ad hoc promotee, the Apex Court has held that the ad hoc promotee has no right to hold the post. Taking into consideration the law as laid down by their Lordships of the Hon'ble Supreme Court in the aforesaid two decisions, the petitioner has no right to continue on the post of the Project Officer on which he has been admittedly promoted purely on ad hoc and temporary basis. That is the only one aspect of the matter. The appointment of the petitioner by promotion on ad hoc and temporary basis on the post of Project Officer was a fixed term appointment and it has come to an end by efflux of time. It is different matter that it continues.

9. Yet there is another aspect which needs consideration. Even the ad hoc and temporary promotion should have been made in consonance with the provisions of Articles 14 and 16 of the Constitution. It is not the case where the promotion has to be made merely on the basis of seniority. Though the petitioner has averred that he was senior-most in the category of Community Organiser, but he has not produced any seniority list on the record. Even if it is taken so then too merely on the basis of that seniority alone, I fail to see any justification in giving the appointment by promotion on ad hoc basis to the petitioner. Articles 14 and 16 contemplates of consideration of the cases for promotion of all the eligible candidates. That precisely has not been done. It is a case where the petitioner alone has been chosen to be given the promotion on the post of Project Officer on ad hoc and temporary basis. Allowing continuation on the post only on the basis of adhoc and temporary promotion shall not culminate in regular and permanent appointment. So the claim of the petitioner made in this special civil application for direction to the respondents to appoint the petitioner as a permanent Project Officer is not tenable.

10. The pleadings of the earlier petition filed by

the petitioner before this Court have not been produced on record but from the order of this Court dated 7th January, 1984, it is clear that the petitioner has prayed for the direction to the respondents not to fill in the post of Project Officer by direct recruitment and the ancillary prayer would have been to give him the appointment on the said post by promotion. That writ petition had been withdrawn by the petitioner unconditionally i.e. liberty was not given to the petitioner to file fresh petition in respect of same subject matter. By withdrawal of the earlier petition, the petitioner has given up the challenged to the action of the respondent-Municipality to make appointment on the post of Project Officer by direct recruitment. In the special civil application, the petitioner has given out that the petitioner's advocate was not acquainted with the fact that the petitioner has already made an application on 14th August, 1984 in response to the advertisement of the respondent No.1 calling the applications for appointment on the post of Project Officer and on erroneous apprehension this writ petition has been withdrawn. It is very convenient to say this, but the facts are that the petitioner has not moved an application for recalling of the order dated 3rd January, 1985. Otherwise also, when the petitioner has admittedly applied for the post of Project Officer for direct recruitment how far it is relevant that this fact was not in the notice of the counsel for the petitioner. From the reading of the order of this Court, it clearly comes out that this Court was not inclined to admit the petition, but the counsel for the petitioner has taken a chance to give the petitioner an opportunity to compete in the competition for the post of Project Officer. This petition in respect of same subject matter after withdrawal of the earlier petition without any liberty to file fresh is not maintainable. It is a settled law that when once the petition has been withdrawn without permission to file fresh, the subsequent petition in respect of same cause of action or same subject matter is not maintainable. Reference in this respect may have to the two decisions of this Court in the case of Natvar Textiles vs. Union of India reported in 1990 (1) GLR 338 and in the case of Athhavisai Modh Chatar Vedignati Panchors vs. State of Gujarat reported in 1996 (2) GCD 65. So on merits the petitioner has no case and otherwise also this petition is not maintainable on the subject matter of the action of the respondent-Municipality to fill up the post of Project Officer by making the direct recruitment and claim of the petitioner for promotion on the said post.

11. Now only remains the question of claim of the petitioner for difference of salary of the post of Project Officer for the period during which he worked thereon, it is suffice to say that the petitioner is not entitled to any grade increment as he has not been given the regular promotion thereon. However, admittedly, the petitioner worked on the post of Project Officer which is a post of higher responsibilities and duties as well as of higher pay scale than the post of Community Organiser. The respondents have taken the work from the petitioner of higher post, and as such, the claim of the petitioner for the pay scale of the said post certainly deserves consideration. The respondents have failed to give out any justification for giving of the petitioner only the pay in the pay scale of the Community Organiser. Even if we go by the order of appointment of the petitioner by promotion on the post of Project Officer the pay scale of the post has also been mentioned. In view of this fact, however, this is a matter to be decided by the respondent No.2.

12. In the result, this special civil application fails and the same is dismissed. However, so far as the claim of the petitioner for salary on the post of Project Officer for the period during which he worked on the said post is concerned, it is open to him to file a representation to the Director of Municipalities, the respondent No.2 herein, within a period of one month from the date of receipt of certified copy of this order and in case such a representation is made then the respondent No.2 shall consider the same and pass necessary order. In case he finds that the petitioner worked on the post for this period then the payment of difference of salary and arrears of difference of salary should be determined within reasonable time and the payment thereof be made to the petitioner within next one month of determination thereof. Rule discharged subject to the aforesaid direction. Interim relief, if any, granted by this Court stands vacated. No order as to costs.

zgs/-